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Casenotes: Workers' Compensation Law — Coemployee Liability — Injured Employees May Not Recover Damages from Supervisors or Corporate Officers Absent the Breach of a Personal Duty of Care. *Athas v. Hill*, 300 Md. 133, 476 A.2d 710 (1984)

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CASENOTES

WORKERS' COMPENSATION LAW — COEMPLOYEE LIABILITY — INJURED EMPLOYEES MAY NOT RECOVER DAMAGES FROM SUPERVISORS OR CORPORATE OFFICERS ABSENT THE BREACH OF A PERSONAL DUTY OF CARE. *Athas v. Hill*, 300 Md. 133, 476 A.2d 710 (1984).

A busboy was injured at work when he was stabbed by a coemployee.¹ The busboy filed for and received compensation² under the Maryland Workmen's Compensation Act³ and then sued supervisory personnel retained by the corporate employer,⁴ arguing that his supervisors had negligently failed to exercise due care in providing him with a safe workplace.⁵ The trial court sustained the defendants' demurrer. The Court of Special Appeals of Maryland affirmed.⁶ The court of appeals affirmed, and held that the Maryland Workmen's Compensation Act did not authorize an action against supervisory employees or corporate officers for violation of the employer's nondelegable duties, because neither the supervisors nor the officers had assumed a personal duty of care toward the busboy by performing the corporate employer's nondelegable duties.⁷ The court of appeals reasoned that the duties to provide a safe workplace and to retain only competent, nonviolent employees were not delegable to supervisory personnel and, therefore, the corporate employer was solely responsible for ensuring the performance of these duties.⁸

Prior to the adoption of workmen's compensation legislation, common law rules of tort liability permitted an employee to sue his employer

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1. *Athas v. Hill*, 300 Md. 133, 134, 476 A.2d 710, 711 (1984). The busboy and his assailant both worked at a Baltimore County country club on the date of the attack. *Id.*
 2. *Athas v. Summit Country Club*, No. A-607848 (Md. W.C.C. Dec. 31, 1974) (original award of compensation by Maryland Workmen's Compensation Commission); see also *Athas v. Summit Country Club*, No. A-607848 (Md. W.C.C. Jan. 24, 1978) (order supplementing original award of compensation).
 3. MD. ANN. CODE art. 101, § 37 (1985).
 4. In the same case, the busboy also sued his coemployee for assault and secured a judgment against him in the amount of \$73,000 compensatory and \$5,000 punitive damages. The case was in litigation in the trial and appellate courts of Maryland for nearly a decade. For a concise chronology of the procedural evolution of the case, see *Athas v. Hill*, 54 Md. App. 293, 295 n.3, 458 A.2d 859, 860-61 n.3 (1983), *aff'd*, 300 Md. 133, 476 A.2d 710 (1984).
 5. *Athas v. Hill*, 300 Md. 133, 135, 476 A.2d 710, 711 (1984). The busboy alleged that the supervisory personnel had notice of the coemployee's propensity for violence and had failed to provide the busboy with a warning. The busboy argued that because he had no reason to know of the coemployee's propensity, the supervisors had breached their duty to ensure worker safety by continuing to employ the violent individual. *Id.*
 6. *Athas v. Hill*, 54 Md. App. 293, 307, 458 A.2d 859, 867 (1983), *aff'd*, 300 Md. 133, 476 A.2d 710 (1984).
 7. *Athas v. Hill*, 300 Md. 133, 148-49, 476 A.2d 710, 718 (1984).
 8. *Id.* at 149, 476 A.2d at 718.

for injuries sustained in the course of employment.⁹ The employee, however, was entitled to recovery only upon a showing that his injuries had resulted from the negligence of his employer.¹⁰ Moreover, the employee's ability to recover was further limited by the requirement that he show his employer had violated a specific duty of care.¹¹ In addition, the employee was required to successfully overcome the common law defenses of assumption of risk, contributory negligence, and the fellow servant rule interposed by his employer.¹²

9. See, e.g., *Miller v. Western Maryland R.R.*, 105 Md. 30, 65 A. 635 (1907) (dependents of decedent employee sued employer for negligence); *Norfolk & W.R.R. v. Hoover*, 79 Md. 253, 29 A. 994 (1894) (injured employee sued employer for negligence); *State ex rel. Hamelin v. Malster*, 57 Md. 287 (1881) (dependents of decedent employee sued employer for negligence); M. PRESSMAN, *WORKMEN'S COMPENSATION IN MARYLAND* § 1.1 (2d ed. 1977); Note, *Exceptions to the Exclusive Remedy Requirements of Workers' Compensation Statutes*, 96 HARV. L. REV. 1641, 1641 (1983).

10. W. PROSSER & W. KEETON, *PROSSER AND KEETON ON THE LAW OF TORTS* § 80, at 569 (W. Keeton ed. 1984) [hereinafter cited as PROSSER AND KEETON].

11. At common law the employer had a responsibility to discharge five specific duties in order to promote the safety of his employees. The five common law duties were:

- 1) to provide a safe workplace;
- 2) to provide safe equipment in the workplace;
- 3) to warn employees about the existence of dangers of which the employees could not reasonably be expected to be aware;
- 4) to provide a sufficient number of competent fellow employees; and
- 5) to promulgate and enforce rules governing employee conduct for the purpose of enhancing safety.

PROSSER AND KEETON, *supra* note 10, § 80, at 569. Moreover, these five duties were considered to be nondelegable because the employer could not relieve himself of the responsibility for ensuring that they were carried out. *Id.* at 572. It should also be noted that these duties remain applicable in employer/employee relationships that do not fall within the purview of the Maryland Workmen's Compensation Act. See *Wood v. Abell*, 268 Md. 214, 300 A.2d 665 (1973) (decedent found to be a "casual employee" within the meaning of the definition set forth in MD. ANN. CODE art. 101, § 21 (c)(4) (1985), thereby excepting the employee from inclusion under the Act and allowing his dependents to institute a common law action against his employer); *Jarka Co. v. Gancl*, 149 Md. 425, 131 A. 754 (1926) (injured stevedore could pursue a common law negligence action against his employer because he was excepted from coverage by the Workmen's Compensation Act by virtue of an exception for maritime employees).

12. See PROSSER AND KEETON, *supra* note 10, § 80, at 569. Dean Prosser dubbed the three common law defenses the "unholy trinity" because of their tendency to relieve the employer from liability for employee injuries sustained as a result of the employer's failure to discharge his common law duties. *Id.* The fellow servant rule was utilized to shield an employer from liability in situations where one employee was injured by the negligence of another. See *Norfolk & W.R.R. v. Hoover*, 79 Md. 253, 29 A. 994 (1894). The fellow servant rule provided that where an employee sued his employer for injuries suffered as a result of the negligence of a fellow employee, the injured employee had to prove that the fellow employee's negligence caused his injury and that their employer was also negligent either in hiring or retaining the fellow employee. *Id.* at 261-62, 29 A. at 995. The common law defenses of contributory negligence and assumption of risk were also recognized in Maryland and were utilized by employers to defeat an injured employee's claim for damages. See, e.g., *Miller v. Western Maryland R.R.*, 105 Md. 30, 65 A. 635 (1907) (defense of contributory negligence used to defeat recovery by dependents of decedent em-

Workmen's compensation legislation¹³ was enacted to rectify problems that developed when traditional tort law negligence principles were used to determine employer liability.¹⁴ The onset of the industrial revolution spurred a dramatic increase in the number of employees working in manufacturing and manufacturing-related industries, which resulted in a corresponding increase in the number of employment-related injuries.¹⁵ Employees faced the protracted and expensive task of proving that their injuries had been caused by the negligence of their employers and not by a negligent act of their own. Employers, on the other hand, were potentially vulnerable to a multiplicity of actions and to large damage awards.¹⁶

State legislatures adopted workmen's compensation as a solution, importing it from the German system of social insurance, which required both the employer and the employee to contribute monies to a state-administered fund.¹⁷ As enacted in the United States, however, workmen's compensation differed appreciably from the German system in that American laws required unilateral employer contribution.¹⁸ Workmen's compensation legislation was first enacted in the United States by the state of New York in 1910, and thereafter spread quickly across the nation.¹⁹

Maryland passed its Workmen's Compensation Act in 1914.²⁰ "The [Workmen's Compensation Act²¹] embodies a comprehensive scheme to

ployee); State *ex rel.* Hamelin v. Malster, 57 Md. 287 (1881) (defense of assumption of risk used to defeat recovery by dependents of decedent employee); see also 1 A. LARSON, WORKMEN'S COMPENSATION LAW § 4.30 (1983) (brief discussion of the genesis and evolution of the common law defenses).

13. For a concise discussion of the history and theory underlying workmen's compensation, see 1 A. LARSON, *supra* note 12, §§ 1.00-5.30.

14. See *id.* §§ 4.00-4.50; M. PRESSMAN, *supra* note 9, § 1.1.

15. See 1 A. LARSON, *supra* note 12, § 4.00.

16. See M. PRESSMAN, *supra* note 9, § 1.1; cf. 1 A. LARSON, *supra* note 12, §§ 4.00-5.20 (positing that workmen's compensation legislation was occasioned by an increase in industrial injuries and a decrease in remedies available to injured employees).

17. See 1 A. LARSON, *supra* note 12, § 5.10.

18. *Id.*

19. *Id.* §§ 5.10-20. Larson views the form of workmen's compensation adopted in the United States as a private form of industrial insurance, as opposed to the "pure social insurance" systems adopted in Germany and Great Britain. *Id.* § 3.10. The form of compensation adopted in the United States was a radical departure from the status quo. Payment of compensation no longer turned on the issue of fault: the employer agreed to provide compensation regardless of whether employee negligence had contributed to a specific employee's injuries. Moreover, the employee agreed to forego common law damage actions against his employer. See M. PRESSMAN, *supra* note 9, § 1.1.

20. Act of Apr. 16, 1914, ch. 800, 1914 Md. Laws 1429 (codified at MD. ANN. CODE art. 101). In 1902, Maryland passed legislation establishing a cooperative insurance fund for hazardous occupations. See Act of Apr. 1, 1902, ch. 139, 1902 Md. Laws 218 (codified at MD. ANN. CODE art. 102). The insurance fund legislation, however, was held unconstitutional. See Franklin v. United Rys. & Elec. Co., 2 Baltimore City Rep. 309 (Balto. City Ct. Common Pleas 1904).

21. For a concise discussion of the history, purpose, and construction of the Maryland

withdraw all phases of extra-hazardous employments from private controversy and to provide sure and certain relief for injured workmen"²² As with all workmen's compensation legislation, Maryland's Act makes compensation the employee's exclusive remedy against his employer.²³

The passage of workmen's compensation legislation created an equilibrium between the competing interests of the injured employee and his employer. The injured employee received a guaranteed amount of income that was fixed by statute; his employer acquired the ability to stabilize costs and a statutory mechanism that precluded a multiplicity of suits.²⁴ Concessions, however, were extracted from each side. The employee agreed to forego common law tort actions against his employer in exchange for his employer's promise to compensate the injured employee regardless of fault and to relinquish utilization of the common law defenses.²⁵

Negligence actions between coemployees are common.²⁶ At present, however, the states are divided as to whether to extend the employers' privilege of immunity from tort actions to coemployees as well.²⁷ Many states extend immunity to employers and to all coemployees who are engaged in the same line of employment.²⁸ Several states, however,

Workmen's Compensation Act, see M. PRESSMAN, *supra* note 9, §§ 1.1-3 (2d ed. 1977 & Supp. 1980).

22. *Athas v. Hill*, 54 Md. App. 293, 297, 458 A.2d 859, 862 (1983) (citing *Continental Casualty Co. v. Mirabile*, 52 Md. App. 387, 449 A.2d 1176, *cert. denied*, 294 Md. 652 (1982)), *aff'd*, 300 Md. 133, 476 A.2d 710 (1984).

23. MD. ANN. CODE art. 101, § 15 (1985); see also *id.* preamble; Amchan, "Callous Disregard" for Employee Safety: The Exclusivity of the Workers' Compensation Remedy Against Employers, 34 LAB. L.J. 683, 684 (1983).

24. M. PRESSMAN, *supra* note 9, § 1.1.

25. *Id.*; see *supra* note 12 and accompanying text.

26. See, e.g., *Neal v. Oliver*, 246 Ark. 377, 438 S.W.2d 313 (1969) (coemployees may be liable as third party tort-feasors); *Colarusso v. Mills*, 99 R.I. 409, 208 A.2d 381 (1965) (injured employee may collect workmen's compensation and sue a coemployee); *Wilson v. Hasvold*, 86 S.D. 286, 194 N.W.2d 251 (1972) (same). For a discussion of third party actions, which include coemployee actions, under workmen's compensation statutes, see Bernstein, *Third Party Claims in Workers' Compensation: A Proposal to Do More With Less*, 1977 WASH. U.L.Q. 543, 544.

27. Compare, e.g., ALASKA STAT. § 23.30.055 (1985) (employers and coemployees immune from tort actions) and CONN. GEN. STAT. ANN. § 31-293a (West Supp. 1985) (same except that coemployees are not immune from suits for injuries caused by their willful or malicious acts or by their operations of motor vehicles) and GA. CODE ANN. § 34-9-11 (1982) (employers and coemployees immune from tort actions) and OKLA. STAT. ANN. tit. 85, § 44(a) (West Supp. 1985) (employers and coemployees immune from tort actions) with ARK. STAT. ANN. § 81-1340 (1976) (coemployees not immune from tort actions) and MINN. STAT. ANN. § 176.061 (West 1966 & Supp. 1985) (same) and S.D. CODIFIED LAWS ANN. § 62-4-38 (1978) (same) and VT. STAT. ANN. tit. 21, § 624 (1978) (same). A third immunity category, which deals with contractors, is beyond the scope of this casenote.

28. See, e.g., *Elliott v. Brown*, 569 P.2d 1323 (Alaska 1977) (statutory coemployee immunity provision excepts intentional torts); *Edmundson v. Rivera*, 169 Conn. 630, 363 A.2d 1031 (1975) (statutory coemployee immunity provision excepts intentional torts and cases of negligence that involve operation of a motor vehicle); *Williams v.*

limit immunity to employers only and permit the injured employee to pursue tort law remedies against his coemployees.²⁹

Recent actions affecting coemployee immunity have extended the cloak of immunity provided employers to cover coemployees as well.³⁰ A number of states have resisted complete capitulation and have, instead, adopted a moderate stance that permits coemployees to claim immunity for acts of negligence but not for intentional torts.³¹

A sizeable minority of states permits employees to sue coemployees under both negligence and intentional tort theories.³² The unifying rationale underlying these decisions is that the ultimate loss from the injurious transaction should fall upon the tort-feasor.³³

Section 58 of the Maryland Workmen's Compensation Act³⁴ provides an employee injured by the act of a third party with a choice of remedies. The injured employee may proceed against his employer to obtain compensation or, instead, sue the third party tort-feasor for damages.³⁵ If compensation is awarded, the employer may utilize the employee's cause of action to sue the third party, provided that any damages

Byrd, 242 Ga. 80, 247 S.E.2d 874 (1978) (statutory coemployee immunity provision); Willes v. Grace Petroleum Corp., 671 P.2d 682 (Okla. Ct. App. 1983) (defendant was not a coemployee under definition provided in statutory coemployee immunity provision); see also 2A A. LARSON, *supra* note 12, § 72.21 (indicating this to be the majority rule).

29. See, e.g., Neal v. Oliver, 246 Ark. 377, 438 S.W.2d 313 (1969) (coemployees may be liable as third party tort-feasors); Colarusso v. Mills, 99 R.I. 409, 208 A.2d 381 (1965) (injured employee may collect workmen's compensation and sue a coemployee); Wilson v. Hasvold, 86 S.D. 286, 194 N.W.2d 251 (1972) (same); Herbert v. Layman, 125 Vt. 481, 218 A.2d 706 (1966) (supervisory coemployee amenable to suit). For a list of jurisdictions that permit coemployee actions, see 2A A. LARSON, *supra* note 12, § 72.11, at 14-55 n.13.1.
30. See, e.g., ALASKA STAT. § 23.30.055 (1984) (employers and coemployees immune from tort actions); CONN. GEN. STAT. ANN. § 31-293a (West Supp. 1985) (same except that coemployees are not immune from suits for injuries caused by their willful or malicious acts or by their operations of motor vehicles); GA. CODE ANN. § 34-9-11 (1982) (employers and coemployees immune from tort actions); OKLA. STAT. ANN. tit. 85, § 44(a) (West Supp. 1985) (employers and coemployees immune from tort actions). For a list of jurisdictions that have abolished coemployee actions see 2A A. LARSON, *supra* note 12, § 72.21, at 14-73 n.23.
31. See, e.g., CAL. LAB. CODE § 3601(a) (West 1971 & Supp. 1986) (in addition to exception for intentional torts there is no immunity for torts committed by intoxicated employees); CONN. GEN. STAT. ANN. § 31 (West Supp. 1985); FLA. STAT. ANN. § 440.11(1) (West 1981); LA. REV. STAT. ANN. § 23:1032 (West 1985).
32. See Fireman's Fund Am. Ins. Co. v. Coleman, 394 So. 2d 334 (Ala. 1980); Kilpatrick v. Superior Court, 105 Ariz. 413, 466 P.2d 18 (1970); Sylcox v. National Lead Co., 225 Mo. App. 543, 38 S.W.2d 497 (1931); Rehn v. Bingamen, 151 Neb. 196, 36 N.W.2d 856, *appeal dismissed*, 338 U.S. 806 (1949); ARK. STAT. ANN. § 81-1340 (1976); MD. ANN. CODE art. 101, § 58 (1985); MINN. STAT. ANN. § 176.061 (West 1966 & Supp. 1985); S.D. CODIFIED LAWS ANN. § 62-4-38 (1978); VT. STAT. ANN. tit. 21, § 624 (1978).
33. See 2A A. LARSON, *supra* note 12, § 71.10.
34. MD. ANN. CODE art. 101, § 58 (1985).
35. *Id.* If the employee is injured by the acts of his employer and a third party acting as joint tort-feasors, the employee may file for compensation against his employer and sue the third party for damages. *Id.*

in excess of the awarded compensation are paid to the injured employee.³⁶ Although third parties are amenable to suit under section 58, the choice of remedies provision prevents the employee from collecting twice for the same injury.³⁷

The first Maryland appellate decision³⁸ to examine coemployee amenability to an action for negligence, *Hutzell v. Boyer*,³⁹ acknowledged that the Maryland Act precludes tort actions by an employee against his employer, but does not forbid an injured employee from suing a coemployee.⁴⁰ The *Hutzell* court bolstered its holding that coemployees were amenable to suit by noting that for fifty years the Workmen's Compensation Act had not forbidden suits against coemployees.⁴¹ Decisions following *Hutzell* have refused to curtail an employee's right to prosecute tort actions against a coemployee.⁴² Neither *Hutzell* nor its progeny, however, discussed the issue of coemployee amenability to suit in terms of the third party provision⁴³ of the Act. The language that rendered third parties amenable to suit⁴⁴ was accepted at face value.

The Act's operative third party amenability language states that an employee may file an action at law if he is injured by the tortious act of "some person other than the employer."⁴⁵ In the lone appellate decision⁴⁶ expressly construing this language, *Schatz v. York Steak House*

36. *Id.* If the employer does not file suit against the third party within two months after the award of compensation, the employee may sue the third party. If the employee obtains a recovery from the third party, however, the employer must be reimbursed his outlays for compensation, medical or surgical costs, funeral expenses, disability or death payments, and vocational rehabilitation expenses. *Id.*

37. M. PRESSMAN, *supra* note 9, § 6-2, at 530.

38. At least one Maryland trial court previously held that a negligent coemployee was amenable to suit. *Crown Cork & Seal Co. v. Hutter*, Daily Record, March 13, 1943, at 5, col. 1 (Super. Ct. Balto. City [date of case omitted in Daily Record]).

39. 252 Md. 227, 249 A.2d 449 (1969).

40. *Id.* at 232, 249 A.2d at 452.

41. *Id.* at 233, 249 A.2d at 452.

42. See *Leonard v. Sav-A-Stop Servs.*, 289 Md. 204, 206, 424 A.2d 336, 337 (1981) (employer was not required to warn his driver that the company insurance policy did not indemnify the driver as to bodily injuries suffered by a coemployee); *Connor v. Hauch*, 50 Md. App. 217, 222, 437 A.2d 661, 664 (1981) (section 58 permitted Maryland residents, who sustained injury in an automobile accident in Delaware while on business, to prosecute a negligence action in Maryland against a coemployee despite having received workmen's compensation payments under provisions of the Maryland Act), *aff'd*, 295 Md. 120, 453 A.2d 1207 (1983).

43. MD. ANN. CODE art. 101, § 58 (1985).

44. Section 58 states:

Where injury or death for which compensation is payable under this article was caused under circumstances creating a legal liability in *some person other than the employer* to pay damages in respect thereof, the employee . . . may proceed either by law against that other person to recover damages or against the employer for compensation under this article, or in the case of joint tort-feasors against both

MD. ANN. CODE art. 101, § 58 (1985) (emphasis added).

45. *Id.*

46. None of the cases cited *supra* in notes 39 and 42 turned on a construction of the amenability provision in section 58. See generally *Leonard v. Sav-A-Stop Servs.*,

Systems, Inc.,⁴⁷ the court of special appeals concluded that the definition of "third person" contained in the Act includes a coemployee of the injured worker.⁴⁸

Prior to *Athas v. Hill*,⁴⁹ Maryland courts had not decided whether supervisors and corporate officers, by virtue of their coemployee status, were amenable to suit by an injured employee.⁵⁰ Courts of other jurisdictions have used varying approaches to resolve the issue of supervisor and corporate officer amenability. One approach used in coemployee negligence actions embraces the common law concept of vice-principals.⁵¹ Any employee responsible for discharging one or more of the common law duties of his employer⁵² is classified a vice-principal and, as such, owes a personal duty of care to his coemployees.⁵³ Courts using this approach have held that a vice-principal who negligently discharges the common law duties of his employer is liable for breaching the personal duty of care owed to his coemployees.⁵⁴ Supervisory personnel have been held liable under the vice-principal approach for the negligent failure to provide their coemployees with a safe place to work.⁵⁵

The Supreme Court of Wisconsin adopted a more widely utilized approach,⁵⁶ which allowed injured employees to sue supervisory personnel under the third party provision of the Wisconsin Workmen's Com-

289 Md. 204, 424 A.2d 336 (1981) (employer was not required to warn employee that its insurance policy did not indemnify employee against coemployee action for wrongful death); *Hutzell v. Boyer*, 252 Md. 227, 249 A.2d 449 (1969) (Maryland law permitting coemployee tort actions was applicable to a negligence action arising out of an automobile accident that occurred in Maryland while two Maryland residents were returning from a Virginia job site); *Connor v. Hauch*, 50 Md. App. 217, 437 A.2d 661 (1981) (Maryland employees, injured in an automobile accident in Delaware, were not precluded by Maryland law from bringing a coemployee action in Maryland), *aff'd*, 295 Md. 120, 453 A.2d 1207 (1983).

47. 51 Md. App. 494, 444 A.2d 1045 (1982).

48. *Id.* at 499, 444 A.2d at 1048.

49. 300 Md. 133, 476 A.2d 710 (1984).

50. The lone Maryland appellate decision involved an injured employee's action against a supervisory coemployee. The opinion involved the construction of a comprehensive liability policy held by the employer, but did not reach the issue of supervisory coemployee amenability under article 101, section 58. *See Pennsylvania Nat'l Mut. Casualty Ins. Co. v. Bierman*, 266 Md. 420, 292 A.2d 674 (1972).

51. *See, e.g., Fraley v. Worthington*, 385 F. Supp. 605 (D. Wyo. 1974) (Wyoming law applied) (supervisor could be held liable for breaching his employer's nondelegable duty to provide a safe workplace); *Ransom v. Haner*, 362 P.2d 282 (Alaska 1961) (same); *Craven v. Oggero*, 213 N.W.2d 678 (Iowa 1973) (same).

52. *See supra* note 11 and accompanying text.

53. *See Craven v. Oggero*, 213 N.W.2d 678, 682 (Iowa 1973); PROSSER AND KEETON, *supra* note 10, § 80, at 572.

54. *See, e.g., Fraley v. Worthington*, 385 F. Supp. 605, 609 (D. Wyo. 1974) (supervisor could be held liable for breaching his employer's nondelegable duty to provide a safe workplace); *Ransom v. Haner*, 362 P.2d 282, 288 (Alaska 1961) (same); *Craven v. Oggero*, 213 N.W.2d 678, 682 (Iowa 1973) (same).

55. *See supra* note 54 and accompanying text.

56. *See, e.g., Neal v. Oliver*, 246 Ark. 377, 438 S.W.2d 313 (1969); *Zurick Ins. Co. v. Scofi*, 366 So. 2d 1193 (Fla. Dist. Ct. App.) (superseded by statutory amendment), *cert. denied*, 378 So. 2d 348 (Fla. 1979); *State ex rel. Badami v. Gaertner*, 630

pensation Act.⁵⁷ In order for recovery to occur under the Wisconsin approach, the supervisory coemployee must have breached a duty of care that he personally owed to the injured employee.⁵⁸ In addition, the injury must have resulted from an affirmative act of negligence,⁵⁹ and an act for which the corporate employer bears no responsibility.⁶⁰ Because common law nondelegable duties are the exclusive province of the employer,⁶¹ a supervisor is not subject to liability for breaching a nondelegable duty⁶² owed by the corporate employer to the injured employee.

The Wisconsin approach⁶³ is premised upon the assertion that the liability of a corporate officer or supervisor in a third party action must ensue from acts performed as a coemployee, rather than from acts performed by an individual in his corporate capacity.⁶⁴ Corporate supervisory personnel owe their duty of supervision not to the employees, but to the corporate employer.⁶⁵ Thus, in order to promote equilibrium between the policies underlying workmen's compensation⁶⁶ and arguments that support suit by the worker to recover for injuries caused by a supervisor's negligence,⁶⁷ the Wisconsin approach distinguishes between non-

S.W.2d 175 (Mo. Ct. App. 1982) (en banc); *Steele v. Eaton*, 130 Vt. 1, 285 A.2d 749 (1971).

57. See, e.g., *Lupovici v. Hunzinger Constr. Co.*, 79 Wis. 2d 491, 255 N.W.2d 590 (1977); *Pitrowski v. Taylor*, 55 Wis. 2d 615, 201 N.W.2d 52 (1972); *Zimmerman v. Wisconsin Elec. Power Co.*, 38 Wis. 2d 626, 157 N.W.2d 648 (1968). Judicial construction of the third party provision of the Wisconsin Act was subsequently superseded by legislative amendment. See Act of Jan. 1, 1978, ch. 195, § 2, 1977 Wis. Laws (conferring immunity from suit on coemployees) (codified at WIS. STAT. ANN. § 102.03(2) (West Supp. 1985)).

58. See *Lupovici v. Hunzinger Constr. Co.*, 79 Wis. 2d 491, 255 N.W.2d 590 (1977).

59. See *Laffin v. Chemical Supply Co.*, 77 Wis. 2d 353, 253 N.W.2d 51 (1977). The design and installation of a bulk storage system for sulfuric acid was held not to be an affirmative act that exceeded the employer's nondelegable duty to furnish a safe workplace; accordingly, the superintendent who had designed and installed the system had not committed an affirmative act of negligence which would render him personally liable to an employee injured in an explosion of apparatus connected to the system. *Id.* at 361, 253 N.W.2d at 54.

60. See *Kranig v. Richer*, 98 Wis. 2d 438, 297 N.W.2d 26 (1980). The corporate president in *Kranig* was discharging his nondelegable duties of supervision and of providing suitable equipment when his employee was injured; therefore, the issue of the president's negligence was immaterial, because he was acting in his capacity as an employer. The injured employee's sole recourse lay with workmen's compensation. *Id.* at 442-43, 297 N.W.2d at 28.

61. See *supra* note 11 and accompanying text.

62. *Id.*

63. The paradigm used by the Supreme Court of Wisconsin was dubbed the "Wisconsin" approach by the Maryland court of special appeals. *Athas v. Hill*, 54 Md. App. 293, 305, 458 A.2d 859, 866 (1983), *aff'd*, 300 Md. 133, 476 A.2d 710 (1984).

64. *Kruse v. Schieve*, 61 Wis. 2d 421, 426-27, 213 N.W.2d 64, 67-68 (1973).

65. See *Laffin v. Chemical Supply Co.*, 77 Wis. 2d 353, 359, 253 N.W.2d 51, 53 (1977) (citing *Kruse v. Schieve*, 61 Wis. 2d 421, 213 N.W.2d 64 (1973)).

66. See I. A. LARSON, *supra* note 12, § 2.20.

67. See, e.g., *Fraley v. Worthington*, 385 F. Supp. 605 (D. Wyo. 1974) (holding that a supervisory coemployee is amenable to suit for failing to fulfill his employer's common law duty to provide a safe workplace was based on the fundamental tort law theory that the tort-feasor should be liable for the harm caused by his acts); *Ransom*

delegable duties, which are owed by the employer, and personal duties owed by the individual supervisors.⁶⁸ An employee injured by the breach of a nondelegable duty takes his remedy solely from the compensation mandated by the Act.⁶⁹ In comparison, an employee injured by the breach of a personal duty may receive compensation under the Act and may also elect to proceed against the supervisory coemployee for damages.⁷⁰

In *Athas v. Hill*,⁷¹ the plaintiff sued supervisory coemployees for negligently failing to provide a safe place to work.⁷² Hence, the issue of first impression presented to the Court of Appeals of Maryland did not focus exclusively on coemployee amenability to suit; rather, it focused on whether an employee could seek recovery under the provisions of article 101, section 58 against supervisory coemployees for negligently discharging common law duties owed the employee by the corporate employer.⁷³ The court held that Maryland's Act did not authorize the plaintiff to maintain an action against supervisory coemployees for negligently discharging the common law duties of the employer, because those duties were nondelegable in the sense that the supervisory employees who performed them "did not thereby assume a personal duty of care toward the plaintiff."⁷⁴

The court of appeals based its decision upon Maryland cases,⁷⁵ decided prior to the enactment of the Workmen's Compensation Act, that held employers liable for the negligent discharge of nondelegable duties by their supervisory personnel and upon the dichotomy between personal and nondelegable duties espoused in the Wisconsin approach.⁷⁶ Despite the court's conclusions that the term "coemployees" includes supervisors⁷⁷ and that provisions of the Act permit coemployee actions,⁷⁸ the

v. Haner, 362 P.2d 282 (Alaska 1961) (holding that supervisory coemployees are amenable to suit for breach of their employer's duty to provide a safe workplace was based on the assertion that employees are entitled to rely on their supervisors to perform the employer's duties in a nonnegligent fashion).

68. The Supreme Court of Wisconsin has analogized the distinction as follows: third party actions against corporate officers and supervisors are permitted only "when such officer [or supervisor] has doffed the cap of corporate officer [or supervisor], and donned the cap of a coemployee." *Kruse v. Schieve*, 61 Wis. 2d 421, 425, 213 N.W.2d 64, 66 (1973).

69. See *Kranig v. Richer*, 98 Wis. 2d 438, 297 N.W.2d 26 (1980); *Crawford v. Dickman*, 72 Wis. 2d 151, 240 N.W.2d 165 (1976).

70. See *Laffin v. Chemical Supply Co.*, 77 Wis. 2d 353, 253 N.W.2d 51 (1977); *Wasley v. Kosmatka*, 50 Wis. 2d 738, 184 N.W.2d 821 (1971).

71. 300 Md. 133, 476 A.2d 710 (1984).

72. *Id.* at 135, 476 A.2d at 711.

73. *Id.* at 148-49, 476 A.2d at 718.

74. *Id.* at 148, 476 A.2d at 718.

75. See, e.g., *Chesapeake Stevedoring Co. v. Hufnagel*, 120 Md. 53, 87 A. 4 (1913); *Frizzell v. Sullivan*, 117 Md. 388, 83 A. 651 (1912); *Norfolk & W.R.R. v. Hoover*, 79 Md. 253, 29 A. 994 (1894).

76. See *supra* notes 63-70 and accompanying text.

77. *Athas*, 300 Md. at 148, 476 A.2d at 718.

78. *Id.*

claim in *Athas* was disallowed. The dispositive finding was that under the common law of Maryland employers cannot delegate to their supervisory personnel the duties to provide a safe workplace and to retain only competent, nonviolent employees.⁷⁹ Hence, the court applied the Wisconsin approach in light of this finding and determined that the supervisors in *Athas* did not breach a personal duty of care that they owed to the plaintiff.⁸⁰

Although *Athas* leaves Maryland aligned with the minority of jurisdictions that permit coemployee actions,⁸¹ the holding clearly limits the class of potential coemployee defendants by excepting supervisors and corporate officers who discharge their employers' nondelegable duties⁸² from reach of the third party amenability provision.⁸³ As a result of *Athas*, corporate officers and supervisors are amenable to coemployee suits only for the violation of a personal duty of care that they owed to another employee.⁸⁴

Athas v. Hill is best evaluated as a judicial attempt to create equilibrium among policies underlying the third party amenability provision of section 58⁸⁵ and the entirety of the Maryland Workmen's Compensation Act.⁸⁶ The Act was intended to provide the injured employee with a stable income during his recuperative period, to relieve his employer of the expense of defending the increased number of actions that resulted from the onset of industrialization, and to alleviate taxpayer expenses associated with maintenance of courts and juries and provision of support for injured employees and their dependents.⁸⁷ Subsequently, the legislature amended section 58, permitting injured employees to collect compensation and also to sue third parties who may have caused their injuries.⁸⁸ The amendment provided injured employees with more complete relief, because it enabled them to seek damages from the third par-

79. *Id.* Using the analogy proposed by the Supreme Court of Wisconsin, the *Athas* court reasoned that the country club supervisors never "doffed the cap" of corporate officer, because they were performing the common law nondelegable duties of their employer. See *supra* note 68 and accompanying text.

80. *Athas*, 300 Md. at 149-50, 476 A.2d at 718-19.

81. See *supra* note 29 and accompanying text.

82. *Athas*, 300 Md. at 148-49, 476 A.2d at 718.

83. Parties who fit within the class of "some person other than the employer" are amenable to suit under the third party provision of the Act. See MD. ANN. CODE art. 101, § 58 (1985).

84. *Athas*, 300 Md. at 149, 476 A.2d at 718.

85. Although there is a dearth of Maryland legislative history regarding the passage of its third party amenability provision, Professor Larson asserts that third party provisions generally were intended to fix liability on the true tort-feasor, to make the injured worker whole, and to reimburse the employer for his compensation payment. See 2A A. LARSON, *supra* note 12, §§ 71.00-20, at 14-1 to -8.

86. See Act of Apr. 16, 1914, ch. 800, preamble, 1914 Md. Laws 1429 (codified at MD. ANN. CODE art. 101).

87. *Id.*

88. Act of Apr. 9, 1920, ch. 456, § 58, 1920 Md. Laws 763 (codified at MD. ANN. CODE art. 101).

ties that were greater than the amount of compensation available to them under the original statute.

The *Athas* court sagaciously recognized, however, that permitting corporate officers and supervisors to be held liable for failure to maintain a safe workplace would impede efficient business and industrial management and occasion results injurious to the interests of employers. A holding that provided the broadest possible interpretation of the third party amenability provision, thereby rendering supervisors and corporate officers liable for breach of their employers' common law duties, would likely force employers to provide liability insurance to such employees⁸⁹ in order to maintain an efficient level of operation and assure them that they would not risk unlimited liability merely by performing certain types of supervisory chores. Provision of indemnification, a result that is not countenanced by the Act,⁹⁰ would impose substantial additional costs upon many Maryland employers, would tend to discourage large businesses and industrial concerns from expanding or relocating in Maryland, and would emasculate the employer immunity provisions of the Act.⁹¹ Moreover, Maryland employees currently receive protection from hazardous working conditions under both common law⁹² and statutory law,⁹³ which require employers to maintain safe, sanitary workplaces. Hence, permitting supervisory coemployees to be held liable for violating their employers' duty to maintain safe workplaces would contravene common law precedent and the intent of the legislature, which was to hold *employers* liable for breach of this duty.⁹⁴

89. See *State ex rel. Badami v. Gaertner*, 630 S.W.2d 175 (Mo. Ct. App. 1982). The *Badami* Court reasoned that imposing personal liability on supervisors and corporate officers for failure to maintain a safe workplace would require employers to purchase indemnification for such employees; a result that would vitiate the immunity provisions of workmen's compensation law. *Id.* at 180.

90. Under the Act, employers' responsibility regarding compensation is limited to paying, or securing insurance to pay, compensation for the accidental death or disability of their employees. Compensation is payable pursuant to rate schedules provided in the Act. MD. ANN. CODE art. 101, § 15 (1985).

91. *Id.* Payment of compensation is the extent of an employer's liability if he secures payment as mandated by section 15.

92. See *supra* note 11.

93. MD. ANN. CODE art. 89, § 32 (1985).

94. Although the *Athas* court avoided an express interpretation of the third party amenability provision ("some person other than the employer"), it did construe the provision as excluding supervisors and corporate officers who perform the common law nondelegable duties of their employers. 300 Md. at 148, 476 A.2d at 718. The *Athas* court noted that the acts of supervisors and corporate officers performing the corporate employer's nondelegable duties cannot be severed from the corporation. 300 Md. at 149, 476 A.2d at 718. Hence, in cases that involve factual scenarios similar to that found in *Athas*, liability is not created in "some person other than the [corporate] employer." The court's construction of the third party amenability provision is buttressed by statutory construction rules set out in cases that address issues of workmen's compensation law. See, e.g., *Ryder Truck v. Kennedy*, 296 Md. 528, 463 A.2d 850 (1983) (statutory construction turns on legislative intent as gleaned from the statutory language at issue); *Soper v. Montgomery County*, 294 Md. 331, 449 A.2d 1158 (1982) (statutes are to be construed reasonably and in light

The legislature has mandated that the Act is to be "interpreted and construed as to effectuate its general purpose."⁹⁵ The Act was passed to provide injured employees with an income while they are unable to work, to stabilize employer outlays, and to alleviate the pecuniary burden of public assistance shouldered by taxpayers prior to its adoption.⁹⁶ The court's holding in *Athas* is consistent with the legislature's "general purpose" mandate. Injured employees will continue to receive compensation regardless of fault, while employer and taxpayer⁹⁷ costs will remain static. Moreover, the injured employee's right to sue third parties has not been substantially vitiated by the court's holding; the employee retains the ability to sue all third party tort-feasors except supervisors and corporate officers who are charged with performing nondelegable duties.⁹⁸

Although the court utilized the concept of common law nondelegable duties as a bright-line test to preclude liability,⁹⁹ the effect of the test is mitigated by subsequent language contained in the opinion. The court specifically stated that commission of affirmative, direct acts of negligence would render supervisors and corporate officers amenable to suit under section 58.¹⁰⁰ In addition, the court included a caveat that limited its holding to cases that involve substantially similar fact patterns.¹⁰¹ Hence, it is clear that supervisors and corporate officers will be held amenable to suit for the breach of a personal duty that causes injury to their coemployees.¹⁰²

of the purpose to be accomplished). *But see* Howard County Ass'n for Retarded Citizens v. Walls, 288 Md. 526, 418 A.2d 1210 (1980) (Maryland's Workmen's Compensation Act should be construed in the most liberal manner possible under its provisions in favor of the injured employee); Wiley Mfg. Co. v. Wilson, 280 Md. 200, 373 A.2d 613 (1977) (same). Legislative intent, as embodied in the plain language of the third party amenability provision, mandates that officers and supervisors performing the nondelegable duties of their employers be excluded from the reach of section 58, because liability for the negligent performance of such duties is placed on the employer. The *Athas* court provides a reasonable construction of the third party provision: one that balances competing interests of the employee and the employer. Moreover, the court's construction is consistent with the purposes that compelled the initial passage of the Act. *See* Act of Apr. 16, 1914, ch. 800, preamble, 1914 Md. Laws 1429 (codified at MD. ANN. CODE art. 101).

95. MD. ANN. CODE art. 101, § 63 (1985).

96. *See* Act of Apr. 16, 1914, ch. 800, preamble, 1914 Md. Laws 1429 (codified at MD. ANN. CODE art. 101); *supra* text accompanying note 87.

97. Although it would appear at first blush that Maryland taxpayers have reason to complain about the *Athas* decision because injured employees and their dependents are precluded from suing supervisors who negligently discharge nondelegable duties, this is not the case. The frequency of actions against supervisory coemployees is quite low; therefore, few employees will be forced to rely on public funds to supplement their compensation awards or to support their families when compensation terminates.

98. *See Athas*, 300 Md. at 148-50, 476 A.2d at 718.

99. *See supra* notes 66-68 and accompanying text.

100. *Athas*, 300 Md. at 149, 476 A.2d at 718.

101. *Id.* at 150, 476 A.2d at 719.

102. The *Athas* court adopted the "Wisconsin" approach to determine liability of super-

The *Athas* decision is a common sense compromise between the rights of an injured employee and his employer and, as such, is commendable. First, the court did not act to abolish an existing right of action; it merely held that the right to pursue recovery against supervisory coemployees or corporate officers depends upon whether a personal duty of care was owed the employee.¹⁰³ Second, the degree of dangerousness of the employee's work environment is not exacerbated by the court's holding. Employers will continue to act in a manner consistent with protecting their pecuniary interests¹⁰⁴ and, therefore, will take measures necessary to ensure that their employees have safe places to work. Third, the decision is consistent with the legislature's "general purpose" mandate contained in the Act,¹⁰⁵ and it benefits both employers and employees.¹⁰⁶

As a result of *Athas*, coemployee actions against supervisory personnel or corporate officers under the amenability provision of section 58 must be premised upon the breach of a personal duty of care that was owed by the supervisor or officer to the injured employee. Moreover, the court's holding has not substantially narrowed the amenability provision, and the legislature has not acted to amend the provision since the court held that coemployees are amenable to suit in *Hutzell v. Boyer*.¹⁰⁷ It is therefore unlikely that the legislature will alter either the limited immunity provided supervisors and corporate officers by the *Athas* decision or the third party amenability provision of section 58.

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visory coemployees and corporate officers under section 58. *Id.* at 148, 476 A.2d at 718; see *supra* notes 63-70 and accompanying text.

103. *Athas*, 300 Md. at 134, 476 A.2d at 711.

104. Under section 16, employers have an election of compensation methods. Whether the employer chooses insurance or direct payment to the injured employee, he will attempt to mitigate the cost of premiums or the likelihood of payment. MD. ANN. CODE art. 101, § 16 (1985).

105. See *supra* notes 95-98 and accompanying text.

106. The *Athas* holding maintains the "bargain" struck between employers and employees by the passage of workmen's compensation acts. Employers' costs remain static, and employees are permitted to prosecute tort actions against all coemployees except supervisors and corporate officers performing the nondelegable duties of their employers.

107. 252 Md. 227, 249 A.2d 449 (1969).